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IN THE

# SUPREME COURT

OF THE

# UNITED STATES

## NO. 82-401

BAXTER RICE, Individually and as Director of the Department of Alcoholic Beverage Control of the State of California

Petitioner,

v.

EVA RENNER,

Respondent.

## BRIEF OF STATE OF WASHINGTON AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

(1) Whether Congress in 18 U.S.C. § 1161 intended to exclude the respective states from exercising their express powers given them under the Twenty-first Amendment to regulate the importation, distribution and sale of alcoholic beverages in Indian Country within their boundaries.

(2) If Congress did intend to exclude the states from exercising these powers, does Congress have the power to do so and at the same time delegate jurisdiction over liquor traffic in Indian country to Indian tribes in derogation of the respective rights of the state under the Twenty-first Amendment.

## INDEX


| | Page |
|---|---|
| QUESTIONS PRESENTED..... | i |
| INDEX..... | ii |
| INTEREST OF THE STATE OF WASHINGTON..... | 1 |
| REASONS FOR GRANTING THE WRIT. | 6 |
| CONCLUSION..... | 19 |


## TABLE OF AUTHORITIES

### Table of Cases


Bryan v. Itasca County, 426 U.S. 373 (1976)..... 17

Merrion v. Jicarilla Apache Tribe, ___U.S.___ (1982).. 17

Montana v. United States, 450 U.S. 544 (1981)..... 17

Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978)..... 17

United States v. Wheeler, 435 U.S. 313 (1978)..... 17

Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980).....3, 4, 5

## UNITED STATES STATUTES

18 U.S.C. 1154..... 6, 16

18 U.S.C. 1154(c)..... 6

18 U.S.C. 1161, Act of August 15, 1953, 67 Stat. 586..... i, 6, 7, 15, 16, 17

Public Law 83-280, Act of August 15, 1953, 67 Stat. 586..... 16, 17

## WASHINGTON STATUTES

Wash. Rev. Code § 66.24.010(2) 14

## OTHER TEXTS AND AUTHORITIES

Distilled Spirits Council of the United States, Summary of State Laws and Regulations Relating to Distilled Spirits, 1977..... 4

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## INTEREST OF THE STATE OF WASHINGTON

The decision for which the petitioner seeks review involves three separate district court cases, one from California and the other two from Washington. In the first, the defendant was the petitioner

(hereinafter "California"); in the other two, the defendants were the State of Washington and various Washington state officials.

Although the Washington defendants are not joining California in seeking review of the decision below at this time, this is not because we disagree in any way with California, as to either the importance of the issues or the reasons why the decision below was in error. On the contrary, through this brief as amicus curiae we urge the court to review and resolve those issues in California's petition; and we do so just as strongly as if we had filed that petition ourselves.[1]

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1 Our decision not to file a petition ourselves is based on the fact that California clearly has a final judgment from the court below, while Washington does not. The court below reversed the

Washington is one of the eighteen so-called "monopoly" states, i.e., states which allow sales of liquor by the bottle only through a system of stores owned and operated by the state

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district court in the two Washington cases, in which the district court had entered permanent injunctions against any enforcement of Washington's liquor laws, including the laws imposing taxes on liquor. This reversal was based on the grounds that injunctive relief was "premature" (Pet. App. 30A), since the district court had not considered the issue of the validity of the liquor tax on sales to non-Indians in light of Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U. S. 134 (1980) (Pet. App. 27A-30A).

For this reason, we believe a request for review by Washington might itself be viewed as premature. However, much more than tax issues are involved here; and Washington's interest in these other issues is as great as that of California. Hence this amicus brief.

itself.[2] A large number of Indian tribes in Washington are attempting to make an end run on this system.

Besides the two Indian liquor stores which are located on the Tulalip and Muckleshoot Reservations and which are directly involved in the decision below, there are 13 other Indian liquor stores, spread among nine different reservations.[3] Like the Indian cigarette stores, with which this court is familiar from Washington

2 For a list of those states, see Distilled Spirits Council of the United States, Summary of State Laws and Regulations Relating to Distilled Spirits, 1977, pp. 2-17. The remaining 32 states, which include California, are known as "license" states, and are listed at pp. 26-27 of the same publication.

3 There is also a sixteenth Indian liquor store which is outside any reservation, although located on Indian-owned restricted land.

Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980), the principal trade of these stores is with non-Indians.

The State's concern, however, is not limited to these liquor stores. All of the problems which California discusses in its petition will occur in Washington as well. (See, Petition, 11-19, 25-26.) For Washington also regulates, through a licensing system, sales of liquor by the drink, as in restaurants and bars, and sales of wine and beer, whether by the drink, as in taverns, or by the bottle or can, as in grocery stores. That licensing and regulatory control is asserted over all sellers, be they Indian or not.

The decision below effectively removes that control from the State and

vests it exclusively in Indian tribes, so long as the sellers are in "Indian country," as defined in 18 U.S.C. § 1154(c). And this is so whether the sellers and the buyers are Indian or non-Indian.

REASONS FOR GRANTING THE WRIT

Had the two Washington cases involved in the decision below arisen before the enactment, in 1953, of 18 U.S.C. § 1161, the principal statute involved in this case, the outcome could hardly have been in doubt. Indeed, it is difficult to envision those cases then even arising at all. For Indian reservations were completely dry, by reason of a statute which has been in effect for over a century, 18 U.S.C. § 1154. Washington's off-reservation seizures of liquor

bound for a reservation, to be sold there in violation of federal law, could hardly itself constitute a violation of federal law.

One other effect of § 1154 should be noted. By reason of its provisions, not one shred of tribal self-government or sovereignty existed with respect to alcoholic beverages. Congress had taken the decision completely out of the hands of the tribes. Not only were the reservations to be completely dry, but Indians could not even buy alcoholic beverages off the reservation.

It was against this backdrop that Congress enacted 18 U.S.C. § 1161, Act of August 15, 1953, 67 Stat. 586, the title of which was: "An Act to eliminate certain discriminatory

legislation against Indians in the United States."

By its terms, this Act completely lifted the criminal penalties for sale of alcoholic beverages to Indians outside of Indian country, and conditionally lifted them with respect to sales within Indian country. Within Indian country, such penalties would no longer apply

> ". . . to any act or transaction [which] is in conformity with the laws of the state in which such act or transaction occurs and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country . . ."

Under the construction urged by California and Washington in the court below, this language puts the states and the tribes on a par. For the federal criminal penalties to be

lifted, the act or transaction must fully comply with all applicable provisions of both tribal and state law. Each has, in effect, a veto. And if one has provisions which conflict with the other, so that compliance with both sets of provisions is impossible, then the criminal penalties are still applicable, and the area of Indian country involved remains dry.

In terms of the individual seller of alcoholic beverages, be he Indian or non-Indian, that seller must obtain a license from both the tribe and the state, if both state law and a tribal ordinance require one. And the seller must meet all the conditions which each establish for that license. If he fails to meet any of the conditions of one or the other, he is subject to the

preexisting federal penalties, just as before the adoption of the Act.[4]

Such, we argued, was the system which Congress established to eliminate the preexisting "discriminatory legislation against Indians." And the system did just that. Indians--and non-Indians for that matter--could buy and sell alcoholic beverages within the reservation under the same conditions and restrictions as anyone else could outside the reservation. The tribe, however, could add further conditions

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4 If, as in Washington, the state says to the seller of liquor by the drink such as an on-reservation operator of a bar or cocktail lounge: "You must buy your liquor only from the state," while the tribe says: "You must buy your liquor only from the tribe," the result is that he is subject to federal penalties if he buys from either, and the reservation to that extent remains dry.

and restrictions as it wished.

Under that system, the scope of tribal power and the scope of state power for legalizing the previously illegal sales of alcoholic beverages would be identical. Each has equal power to make that transaction legal or illegal.

This is not, however, the system which results from the decision below. Rather than make states and tribes co-equal, the decision below vests in the tribes exclusive jurisdiction to license and distribute alcoholic beverages on the reservation. As stated by the majority opinion:

> ". . . We conclude that under section 1161 the tribes have exclusive jurisdiction to license and distribute liquor on the reservation." (Pet. App. 1A).

Thus, far from just eliminating

discrimination against Indians, the system resulting from the decision below makes the Indians "super citizens," to use the term of Judge Goodwin in his dissent. (Pet. App. 47A). As he describes this result in the context of a monopoly state such as Washington:

> ". . . They, [Indians] and they alone, can buy and import at free market prices any liquor they desire. All other citizens of the state of Washington who desire to purchase liquor must join the queue at the government store and select from a monopoly inventory at a monopoly price. . . . I doubt that Congress intended by § 1161 to pave the way for one favored group of citizens to break the state monopolies that are so cherished by money hungry legislatures." (Pet. App. 47A-48A.)[5]

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5 Non-Indians can and do buy at Indian liquor stores. Indeed, that is a large part of our problem. But these non-Indian purchasers are subject to state

Nor is the new type of discrimination created by the decision below confined to monopoly states. Again, that decision vests exclusive licensing and distribution power in the tribes, though "state substantive standards"--whatever might be meant by that term--would still be applicable. (Majority opinion, Pet. App. 21A). Presumably a state law prohibiting sales of liquor to minors would be such a "substantive standard." But what about qualifications for sellers--e.g., lack of a criminal record--designed to make sure such sellers are not the sort of people who would sell to minors?[6]

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prosecution, at least when they bring the liquor off the reservation; and such prosecutions have in fact been brought. Thus, despite these non-Indian purchases, Judge Goodwin's basic point is correct.

Indian sellers now need only to persuade their tribal government to adopt less stringent qualifications on matters such as this--or no qualifications at all--and they can sell liquor to Indians and non-Indians alike on the reservation, while their non-Indian counterparts, off the reservation, cannot.

As stated by Judge Goodwin:

> ". . . Congress indicated no intent to give Indians greater rights than other citizens enjoy with regard to liquor." (Pet. App. 46A).

Yet that is precisely what the decision below gave them.

Nor did Congress indicate any intent to give Indian tribes any greater power than states with regard

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6 See Wash. Rev. Code § 66.24.010(2).

to liquor; yet that too was given the tribes by the decision below. And this aspect of the decision makes a complete nullity of the Twenty-first Amendment, so far as reservation Indians are involved, for the reasons discussed in California's Petition. (Pet. 19-24). The decision in effect turns § 1161 into the equivalent of a Twenty-first Amendment for Indian tribes, while ignoring the effect of the Amendment itself on state power.

One final related point. The Court below phrased the central issue and the result in terms of "jurisdiction." (Pet. App. 1A.) The use of that term, however, only confuses things. That is why we use the term "control" instead. (See p. 5, supra.

We do not claim that § 1161 confers state or tribal on-reservation jurisdiction over anyone, Indian or non-Indian, similar to that conferred on states by Pub. L. 83-280, Act of August 15, 1953, 67 Stat. 586. Rather, § 1161 only authorizes tribes and states alike to establish the conditions and requirements violation of which will trigger federal criminal jurisdiction under § 1154. And those conditions or requirements may include the holding of a license from the tribe, the state, or both, and the meeting of all the qualifications for such a license. Whether the tribe or the state can go further and invoke their own criminal or civil sanctions for selling alcoholic beverages without a license is not determined by § 1161

at all. The determination of that issue will turn on a number of factors, such as the extent of a state's on-reservation jurisdiction, if any, under Pub. L. 83-280, and the applicability of such cases as Bryan v. Itasca County, 426 U.S. 373 (1976), Oliphant v. Suquamish Tribe, 435 U.S. 191 (1978), United States v. Wheeler, 435 U.S. 313 (1978), Montana v. United States, 450 U.S. 544 (1981) and Merrion v. Jicarilla Apache Tribe, ___U.S.___ (1982).[7]

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7 We do claim, however, complete off-reservation jurisdiction, upon which were based the off-reservation seizures precipitating the two Washington cases. The Court below erroneously struck down such jurisdiction insofar as it is based on general state police power or the Twenty-first Amendment while leaving open the possibility that it might be based on a state's taxing power. See footnote 1, p. 1, supra.

Thus, Judge Goodwin was certainly correct in his observation:

> ". . . All the discussion in the majority opinion about 'conferring' or 'not conferring' jurisdiction upon the states is interesting but seems unresponsive to the purpose of the statute [§ 1161]." (Pet. App. 46A)

While that statute confers jurisdiction on no one, it confers equal rights of control on both tribes and states. In failing to recognize this, the Court below made its fundamental error, and thereby turned things completely upside down, with critical consequences for every one of the states on which Indian reservations are located.[8] For this reason, that

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8 All states are either monopoly states, like Washington, or license states, like California. See footnote 2, page 4, supra.

decision requires review by this Court.

## CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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